No. 15,070

IN THE

United States Court of Appeals

For the Ninth Circuit

TERRITORY OF ALASKA,

Appellant,

vs.

AMERICAN CAN COMPANY, FIDALGO ISLAND PACKING COMPANY, LIBBY, MCNEILL & LIBBY, INC., NAKAT PACKING COMPANY, NEW ENGLAND FISH CO., P. E. HARRIS COMPANY, INC., PACIFIC & ARCTIC RAILWAY & NAVIGATION CO., and OCEANIC FISHERIES CO.,

Appellees.

Upon Appeal from the District Court for the Territory of Alaska, First Judicial District.

REPLY BRIEF FOR THE APPELLANT.

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INTRODUCTION.

This is a reply brief. Appellant shall not attempt to repeat or restate the arguments already set forth in its main brief. Herein, appellant will deal only with new arguments advanced on behalf of the appellees and with certain specific matters in their brief which seem in most urgent need of correction.

Appellees divide their argument into four main headings and numerous subheadings. As an accommodation to this Court, appellant, in its reply, will follow the order of presentation used by them and refer to only those headings and subheadings to which reply is deemed necessary.

In Re: "A. WILL A PERSONAL ACTION LIE FOR THE COLLECTION OF EITHER REAL OR PERSONAL PROPERTY TAXES LEVIED PURSUANT TO CHAPTER 10, SLA 1949. * * *?" (Appellees' Br. 6.)

In Re: "1. There Is No Statutory Liability."

In its opening brief, appellant, Territory of Alaska, referred to numerous sections in Chapter 10, SLA 1949, the Alaska Property Tax Act (hereinafter designated as Chapter 10) which unequivocally support its contention that appellees are personally liable for any property taxes imposed while the Act was in effect. In their answering brief, appellees have sought to escape the impact of this pertinent statutory language, pinning them to an *in personam* liability by cutting across and casually dismissing in one sweeping paragraph the clear statutory language which states that "Every person shall be assessed and taxed annually on his property." See Section 12 of the Act. Appellee's answer to such compelling language is to this effect:

> "All of the sections of the act referred to by appellant (sections 9, 12, 13, 14, 15, 17, 22, 25, 30 and 37) with the exception of section 37 apply to the procedure to be followed in assessing the

> property, completing the assessment roll, hearings before the Board of Assessment and Equalization, etc. Section 37 denounces false returns and records." (Appellees' Br. 7.)

This unqualified statement, designed to minimize the pertinent law, is made notwithstanding that it is the *person* who is "liable to assessment", (Section 9); and it is the *person* who "shall be assessed and taxes annually on his property" (Section 12); and on the assessment roll "the arrears of taxes owing by any *persons*" (Section 14(a)(4)) shall be included thereon, etc. The Act is replete with such language, as has been called to the Court's attention in appellant's opening brief. (Appellant's Br. 18, 19, 20, 21.) Where the Act occasionally refers to the property being assessed it is obvious that it is referring to a method of determining the *value* of the property which measures the tax *imposed on the person.* For example, Section 14 states that the contents of the Assessment Roll shall contain, among other things:

> "(3) the assessed value, quantity, or amount of said property and taxes thereon;
>
> (4) the arrears of taxes owing by any persons;"

And particularly see Section 11 captioned: "Valuation", which was apparently intentionally made to precede Section 12 covering "Assessment" of the person.

Appellees refer to Sections 32, 33, 34 and 42 of Chapter 10 and champion these sections as denouncing appellant's contentions and, conversely, allegedly

supporting their legal theory. (Appellees' Br. 7.) Section 32 denotes the "Time of Payment"; Section 33, the "Mode of Payment"; Section 34, the "Lien", and Section 42, the procedure for the "Recovery of Unpaid Liens". None of these sections reflects any inconsistency with the other sections of Chapter 10 which manifestly make the tax a personal obligation. There is no prohibition precluding the Legislature from looking to both the person and his property as a means of assuring the payment of taxes. In fact, ofttimes, the *in personam* method of recovering taxes is the only way collection can be made from recalcitrant taxpayers who receive personal property from the taxing jurisdiction.

Appellees trod on the alleged ineptness of those who drafted Chapter 10 and find great comfort in the insufficiency of the title. (Appellees' Br. 8.) The English Courts gave no credulence whatever to the title and disregard it as a part of the Act, thus voiding its use as a means of interpreting the meaning of the act itself. However, in the United States the title is alluded to, along with other aids, in that singular instance when its use will help clarify an existing ambiguity. In no event is this objective test ever justifiably employed when it results in a voidance of the subjective legislative intent clearly manifested in the Act or by other evidence.

In Re: "3. The Rule in Other Circuits." (Appellees' Br. 10.)

Appellees quote the alleged "rule in other circuits" regarding the recovery of taxes, stating:

> "The rule denying an equitable action for recovery in the absence of statute was announced as a fundamental principle of law by the Sixth Circuit Court of Appeals, in *Preston v. Sturgis Milling Co.* (1910) 183 F. 1, and personal liability was denied for lack of legislative authority by the Eighth Circuit Court of Appeals in *Helvering v. Johnson County Realty Company* (1922) 128 F. 2d 716. * * *" (Appellees' Br. 10.)

Appellant, Territory of Alaska, is not looking to "equitable action" to recover its taxes. It seeks to employ the common law actions of "debt" or "assumpsit" and, thereafter, if necessary, to foreclose those property tax liens where recovery cannot otherwise be had.

As to *Helvering v. Johnson County Realty Company* (cited by Appellees in the above quotation), that case hinges on the laws of Iowa which apparently specifically hold that no personal liability exists. There is nothing before this Court and nothing was presented in the lower court to compare the Iowa taxing statutes with the language of the Alaska Property Tax Act.

In Re: "4. The Text Writers." (Appellees' Br. 10.)

Appellees cite "Cooley on Taxation, 4th Ed., Vol. 3, p. 2630, Section 1330" as its sole authority under this heading. They state the rule cited by Professor Cooley to be as follows:

> "However, in most jurisdictions it is held that statutory remedies for the collection of delinquent taxes are exclusive and preclude the maintenance

of an action at law, i.e., that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie."

Here is the *full text* of what Professor Cooley actually says:

"In some states it has been held that an action at law may be maintained to collect taxes although a statute provides a special remedy for their collection, unless the statutory remedy is in terms made exclusive. However, in most jurisdictions it is held that statutory remedies for the collection of delinquent taxes are exclusive and preclude the maintenance of an action at law, i.e., that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie. Furthermore, some decisions hold that even where the statute which prescribes a special remedy for collection, other than a personal action, is inadequate or ineffectual, the statutory remedy is exclusive, *but the general rule is that if the statutory remedy is inadequate or ineffectual a personal action to recover the tax will lie.* An action to recover taxes is not precluded by statutory remedies which clearly are not exclusive, * * *." (Numerous cases cited in the footnotes thereof.) (Emphasis added.)

In Re: "5. Taxes Are Not Debts." (Appellees' Br. 11.)

Whether taxes are or are not "debts" is a matter of conflict in many jurisdictions. However, the later

Supreme Court decisions cited by appellant in its opening brief (Appellant's Br. 25) appear to support the conclusion that taxes can be regarded as debts for the purposes of collection when the taxing statute does not prescribe an altogether exclusive remedy or if the remedy is insufficient.

The case of *Meriwether v. Garrett,* 102 U.S. 472, 26 L. Ed. 197, decided in 1880, is alluded to by the appellees in three different instances (Appellees' Br. 11, 15 and 29) for the alleged proposition that "taxes are not debts". However, this authority was easily explained and limited to its facts by the Supreme Court in *Price v. United States,* 269 U.S. 492, 501-2, 70 L. Ed. 373, 378:

> "Lane County v. Oregon, 7 Wall. 71, 19 L. Ed. 101, and Meriwether v. Garrett, 102 U.S. 472, 26 L. Ed. 197, are sometimes cited, and expressions found in the opinions are quoted, to show that taxes are not debts. But when regard is had to the questions decided in these cases, it is clear that they do not sustain the view that, as used in sec. 3466, the word 'debts' does not include taxes due the United States. The question in Lane County v. Oregon was whether under the acts of Congress making United States notes 'legal tender in payment of all debts', the state was bound to accept such notes in payment of taxes required by its own laws to be paid in gold and silver coin. The court held that the acts had no reference to taxes imposed by state authority. There were two clauses which were intended to give currency to the notes. In one of them, taxes were plainly distinguished from debts; and it was

held that the word 'debts' in the other was not intended to include taxes. In Meriwether v. Garrett, it was held that taxes levied before the repeal of a city charter—other than those levied under lawful contract or judicial direction—could not be continued in force by the court after the repeal of the charter; that they had none of the elements of property and could not be seized by judicial process, and could only be collected under authority from the legislature."

The Supreme Court was emphatic when it stated on page 378:

"In the absence of another remedy made exclusive, an action of debt lies to recover taxes where the amount due is certain or readily may be made certain." Page 378, quoting *U. S. v. Chamberlin,* 219 U.S. 250, 55 L. Ed. 204, 210; *Dollar Savings Bank v. U. S.,* 22 L. Ed. 80, 82, 19 Wall. 227, and many other cases.

Appellees also claim precedence in an Alaskan case, *In regard to Street Assessment in the Town of Seward* (1917), 5 Alaska 726, 727, wherein, and by way of dicta, the Court held that taxes are not debts in the ordinary sense of that word. That case involved an attempt by the taxpayer to setoff city taxes against an alleged tort claim. The Court struck down this attempt to thwart the collection of taxes and denied the right of setoff, stating that:

"It would seem that any other rule would render exceedingly difficult, if not impossible, the collection of taxes, as persons would be setting up some claim, real or imaginary, for delay against

the municipality, and thus defeat the highly important and necessary collection of public revenues."

In Re: "6. The Action Is In Rem—Not In Personam." (Appellees' Br. 12.)

Appellees contend the alleged rule of law is that a tax levied against property cannot be collected by a proceeding *in personam.* This would perhaps be true were it not that taxes under Chapter 10 are imposed against the *person.*

In Re: "7. Appellant's Authorities." (Appellees' Br. 15.)

Furthermore, and as was called to the Court's attention in Appellant's Opening Brief at page 22, in many states even where the tax is solely *on the property,* the owner thereof has been held personally liable. Appellant cited thirteen state decisions and one Federal decision in its opening brief supporting this legal proposition. In refutation of these cases, the appellees state:

> "* * * A careful reading of all the state decisions and of the authorities cited in them, discloses that in each case some provision of the state statute was relied upon as the basis of personal liability. * * *" (Appellees' Br. 15.)

Appellant disagrees with this statement if it is intended to imply that specific statutory language existed in each instance imposing personal liability. All of the cases cited refer to a *tax solely on property* and make no mention of personal tax liability based on any tax legislation. Appellant checked its author-

ities on three different occasions and made certain that it was precise in its representation to this Court.

In Re: "B. DID ANY OF THE TAXES SOUGHT TO BE COLLECTED IN THIS ACTION SURVIVE THE REPEAL OF CHAPTER 10, SLA 1949 BY CHAPTER 22, SLA 1953?" (Appellees' Br. 16.)

The argument under this portion of appellees' brief has its reply in the appellant's brief starting at page 30, et seq. However, one particular point is called to this Court's attention. On pages 31 through 34, the appellees engage in considerable speculation as to what *factual* inducements moved the Legislature to pass Section 2 of Chapter 22, SLA 1953, the all-important Section in this litigation. They have now mended their approach and for the first time indicate a realization of the importance of analying this Section, although they did not do so before the District Court. They freely engage in presenting a self-supporting hypothecation of what they believe motivated the lawmakers, although they introduced no evidence supporting their factual assertions. It is striking proof of one of appellant's principal theseis that only with the admission of documentary and other evidence can an ascertainment of the true intent of the Legislature, which is a *factual* question, be made.

In Re: "4. No Remedy Exists." (Appellees' Br. 38.)

Throughout their brief, appellees take pains to explain the distinction between the *right* to tax and the *remedy* to collect such taxes once assessed. Under

the above heading, the appellees contend that no *remedy* remains to the Territory under Chapter 22, the repealing Act, to *collect* any taxes even if it be conceded that such taxes survived the latter Act. However, paradoxically, they still recognize the existence of a remedy in municipalities, school and public utility districts to collect accrued and current taxes (Appellees' Br. 38), *notwithstanding that, as in the case of the Territory, no such remedy was specifically saved under Chapter 22 to these political subdivisions.* Thus, appellees are inconsistent in their legal stand. They must take the position that either Chapter 22, which makes no mention of a remedy, voids the collection of any taxes, or in the alternative that the Act *recognizes an implied right of collection* of all taxes whether it be by the Territory, municipalities or school and public utility districts. They apparently recognize such an implied right in municipalities, school and public utility districts but refuse to acknowledge such an implied right in the Territory.

Beginning on page 38 of Appellees' Brief, they cite *Schmuch v. Hartman,* 70 Atlantic 1091, 1092, together with 50 Am. Jur., pages 535, 536, *Statutes,* Section 539, and Volume 1, *Sutherland on Statutory Construction,* Third Edition, page 537, Section 2050, for the proposition that a pre-existing remedy is lost by repeal. These authorities are all inapplicable, since they are predicated on the nonexistence of a general savings clause.

In Re: "D. DID THE TRIAL COURT ERR IN REJECTING THE INTRODUCTION INTO EVIDENCE OF HOUSE BILL NO. 3?" (Appellees' Br. 41.)

General accusations are made by the appellees to the effect that "matters" were discussed by the appellant which were "not only outside the record in this case but unfamiliar and unknown to appellees". (Appellees' Br. 41.) No specific "matters" are identified, other than Senate Bill No. 5, and appellant is mystified and at a loss to decide what appellees are alluding to by their broad blanket indictment.

Senate Bill No. 5 was identical in all respects to House Bill No. 3, the introduction of which was rejected by the District Court. Although it was repetitious, an official authenticated copy was submitted with the Territory's brief and formally filed in the District Court. Alternatively, it could have been called to the Court's attention by citing page 32 of the 1949 Senate Journal (which is conceded by the appellees to be subject to judicial notice) wherein the word-for-word likeness of the *title* of Senate Bill No. 5 and House Bill No. 3 clearly indicates both bills to be indistinguishable in form, design or purpose.

Under heading "D" the appellees argue: (1) House Bill No. 3 is not admissible evidence and (2) even if admissible, it serves no purpose.

In support of the first argument appellees seek to have this Court condone and adopt a new rule of statutory construction to the effect that only matters which explain "technical terms and expres-

sions, not in common usage", can be admitted into evidence. (Appellees' Br. 43.)

This suggested limitation, ostensibly severe in application, has no justifiable basis or reason for existence. The prime objective in construing statutes is to determine the legislative *intent*. An understanding by the Court of "technical terms and expressions, not in common usage" is but one means of determining that intent. All words being, at best, inexact tools of expression, every relevant aid, extrinsic or otherwise, should be sought in construing laws. To limit extrinsic evidence to that which will explain "technical terms" and nothing more is an unnecessary restraint which thwarts the paramount target of a court, i.e., the determination of the legislative intent.

The gist of the second argument posed by the appellees under this subheading is that even if House Bill No. 3 was admitted, it serves no purpose. This attitude is diametrically opposite to appellees' position in the District Court where they fought so strenuously—and successfully—to keep House Bill No. 3 from being admitted into evidence. Appellees now state:

> "Under the well established rule, the court's taking judicial notice of H. B. No. 3 as abstracted in the journal obviated the necessity of proof thereof, so the court considered that bill regardless of whether or not it denied its admissibility into evidence." (Appellees' Br. 44.)

This is a misleading statement. House Bill No. 3 is not "abstracted in the journal". Nowhere therein

does the original language of the Bill appear where, if enacted, "accrued and unpaid taxes" would have been "cancelled, repealed and abrogated, and declared null and void". (See original House Bill No. 3, Tr. 56.) It has been appellant's contention throughout that by refusing to pass the bill in its original form the Legislature clearly manifested an emphatic denunciation to grant the immense tax windfall appellees are now claiming.

In Re: "MISCELLANEOUS MATTERS." (Appellees' Br. 46.)

In Re: "1. Remedy for the Collection of Tax on Personal Property." (Appellees' Br. 46.)

As to appellees' contention that the procedure of foreclosing liens on property under Section 22-2-8–22-2-18 ACLA 1949, incorporated in Section 42 of Chapter 10, is equally applicable to personal property as to real property, such an assertion is without merit. There are many other Sections in the Code which could have been alluded to and incorporated in Chapter 19 as a preferred method by which liens against personal property could be foreclosed. See Sections 16-1-115, 22-6-10 and 26-9-3, ACLA 1949. Even upon a cursory examination, it is immediately discernable that the Legislature omitted to provide for the collection of taxes on personal property except by such remedies as existed at common law. The general rule, as previously stated, is that if the statutory remedy is inadequate, ineffectual or not exclusive, a personal action to recover the tax will lie. See

Volume 3, *Cooley on Taxation,* Fourth Edition, page 2629, Section 1330.

In Re: "2. Alleging Inequity of Lower Court Decision." (Appellees' Br. 46.)

Appellees attempt to refute the Territory's argument that it will be unfair and unjust if taxes are not collected from those who have intentionally violated and resisted Chapter 10 during the years it was in force, by quoting the District Judge's trial court opinion. In his opinion the Court concluded that taxes owed by tax violators were to be excused,

> "* * * however unjust such result may be as to those taxpayers who paid the property tax without protest".

This is another erroneous assumption. Had any taxpayer paid his tax under protest during the years it was in force, they could not recover said taxes regardless of the outcome of this suit because the validity of this taxing statute has been substantiated. See *Mullaney v. Hess,* 15 Alaska 40, 213 F. 2d 635. It is inescapable that tax violators are now being endowed with favor while those who acted in a lawful and diligent manner and paid their taxes when due—under protest or otherwise—are being unduly penalized, a result necessarily outrageous to the average taxpayer and to the appellant.

CONCLUSION.

For the reasons stated in Appellant's Opening Brief, it is submitted the District Court's judgment should be reversed.

Dated, Juneau, Alaska,
September 5, 1956.

Respectfully submitted,

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